IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-_____

76-1347

THE MARTIN SWEETS COMPANY, INC. - Petitioner

versus

ROSE M. JACOBS - - - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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v.

ROSE M. JACOBS - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, The Martin Sweets Company, Inc. ("Sweets" or "Petitioner"), by counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on February 11, 1977 (App. A, *infra,* pp. A1-A2).

OPINIONS BELOW

The opinion of the Court of Appeals authored by the Honorable Jack R. Miller, Judge, United States Court of Customs and Patent Appeals, sitting by designation (App. B, *infra,* pp. A3-A17) was filed on Febru-

ary 11, 1977. It is reported at 14 FEP Cases 687 but is not yet officially reported. The opinion of the District Court (App. C. *infra,* pp. A18-A23) was entered on August 18, 1975, and is unreported.

JURISDICTION

On February 11, 1977, the Court of Appeals issued its opinion and judgment (respectively, App. B, *infra,* pp. A3-A17, and App. A, *infra,* pp. A1-A2) affirming the decision of the United States District Court for the Western District of Kentucky (judgment, App. D, *infra,* p. A24; amended judgment, App. E, *infra,* pp. A25-A26). The mandate, which would have been issued in the normal course on March 4, 1977, has been stayed by order of the Court of Appeals (App. F, *infra,* p. A27) until April 1, 1977, pending the filing of this petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Does a private employer violate Title VII of the Civil Rights Act of 1964 by terminating an unwed pregnant employee for engaging in non-marital sexual activity of which the employer disapproves?

STATUTE INVOLVED

The relevant portion of Section 703 of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000e-2(a)(1)), is set forth below:

> Sec. 703. (a) It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

STATEMENT OF THE CASE

This case presents a novel question involving the administration and enforcement of Title VII of the Civil Rights Act of 1964 which has never been decided by this Court: whether, absent a showing of dissimilar treatment of similarly situated men and women employees, the provisions of Title VII of the Civil Rights Act of 1964 prohibit a private employer from transferring or terminating a pregnant unwed employee because of that employee's non-marital sexual activities?

Petitioner Sweets is a small, closely held corporation which employs approximately sixty persons and manufactures light machinery at a single plant and office located in Louisville, Kentucky. The operation of the company reflects the high moral standards and beliefs of its founder and principal shareholder.

Rose Jacobs was an unmarried employee of Sweets who learned in August, 1972, that she had recently become pregnant. Within a matter of days her condition was common knowledge throughout the plant. She had voluntarily revealed her unwed pregnant status not through the physical development of her pregnancy,

but by talking with several friends at the plant. Her employer learned of her non-marital sexual activities in the same way, and when asked, Jacobs confirmed this information to her superior.

Jacobs' superior was aware of the high moral standards of the company and felt that the head of the company would not countenance such improper and immoral sexual conduct on the part of an employee; therefore, Jacobs was given notice of termination.[1] She was not terminated pursuant to that notice; instead, for a number of related and unrelated reasons shown in the record, she was transferred from her position as secretary in the executive offices to another clerical position in the purchasing department with the same wages, hours, benefits and other perquisities as her original job. Jacobs left her employment shortly thereafter.

Jacobs obtained a letter from the EEOC authorizing an action against Sweets, and she filed in the District Court an action under Title VII including, *inter alia,* an individual claim of sex discrimination based

[1]The testimony of Respondent Jacobs on direct examination by her counsel at trial revealed that Jacobs was at most five weeks pregnant at the time she was given notice of termination. Jacobs testified that her superior said, and that it was common knowledge among employees, that the company was a highly religious organization and that the head of the company would not accept such "goings-on." Jacobs also testified that, when she asked for time to consider whether or not to have the child, her superior told her that whether she decided to terminate her pregnancy was of no moment to the employment decision at hand. *Transcript of the Proceedings,* July 17, 1975, pp. 39-41, 57, 103. Part, but not all, of this evidence is recited in the opinion of the Court of Appeals (App. B, *infra,* p. A5).

upon the alleged termination.[2] After a trial without a jury, the court found that Jacobs had been "terminated and/or constructively terminated" because she was "pregnant and unmarried" (App. C, *infra,* p. A21). The District Court held that Sweets' actions constituted discrimination on the basis of sex prohibited by Title VII (App. C, *infra,* pp. A21-A22).

Sweets appealed to United States Court of Appeals for the Sixth Circuit. After briefing and oral argument of the case before that court, this Court rendered its opinion in *General Electric Co.* v. *Gilbert,* 429 U. S. ——, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976). On Sweet's motion, the Sixth Circuit accepted briefs respecting the appropriate application of the *General Electric* holding to the instant case. Sweets, Jacobs, and EEOC as amicus all filed such briefs.

The Court of Appeals affirmed the holding of the District Court, while acknowledging that neither court had required Jacobs to show dissimilar treatment of men and women similarly situated, i.e., that the employment actions taken with respect to her would not have been taken with respect to a male who had engaged in non-marital sexual practices or preferences (App. B, *infra,* p. A12). The *General Electric* case was

[2]The complaint also alleged a violation of Title VII in the terms and conditions of Sweets' employment policy regarding pregnancy including paid sick leave and medical expenses benefits. Jacobs sought to maintain this claim as a class action. After initially granting Jacobs' request for a class certification, the District Court, citing lack of standing and failure to meet class action requirements, declined to certify a class and refused to consider Jacobs' individual claim of discrimination with regard to paid sick leave and medical expenses benefits (App. E, *infra,* p. A26). The Sixth Circuit affirmed on the same grounds (App. B, *infra,* pp. A14-A16).

relegated to a footnote because it was said to deal only with employee *benefits* cases and because the Court of Appeals wished to limit any possible effect of *General Electric* exclusively to such cases (App. B, *infra*, p. A12 n. 12).

The Sixth Circuit rejected an argument that the action taken by Sweets was, in fact, based not upon Jacobs' gender but upon a reaction to Jacobs' sexual practices which Sweets considered to be improper and immoral. The courts below never found, and Jacobs never sought to prove, that Sweets had any policy or practice, neutral on its face, which had any gender-based discriminatory effect. *Rather, the holding below is that solely because Jacobs was pregnant and pregnancy is unique to women, Sweets' action constituted some sort of per se violation of the sex discrimination provision of Title VII.*

REASONS FOR GRANTING THE WRIT

The rule of law applied by the Court of Appeals for the Sixth Circuit in this case will result in a finding of sex discrimination under Title VII every time an adverse employment action is taken with respect to a pregnant employee. Although this Court has never directly addressed the precise factual and legal question posed by this case,[3] the decision of the Court of

[3]This Court granted a petition for writ of certiorari in one case involving refusal to hire or rehire employees because they were unwed parents of illegitimate children, but then dismissed certiorari as improvidently granted, apparently on grounds inapplicable to this case. *Andrews* v. *Drew Municipal Separate School District*, 371

(Footnote continued on following page)

Appeals is in direct conflict of principle with decisions of this Court and others cited herein, especially with regard to the standards and analysis to be applied in Title VII sex discrimination cases.

The Court of Appeals has improperly expanded the scope of the sex or gender discrimination provision of Title VII to include a prohibition against employment actions taken on grounds other than the employee's gender. If allowed to stand, the Sixth Circuit's unwarranted extension of Title VII in this case will not only prejudice Petitioner, but will also constitute a dangerous intrusion into the freedom of every private employer to establish and maintain employment standards or to take employment actions which do not discriminate between men and women on the basis of sex or gender.

Every Title VII sex discrimination decision of this Court beginning with *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542, 91 S. Ct. 496, 27 L. Ed. 2d 613 (1971), and continuing through *General Electric Co.* v. *Gilbert*, 429 U. S. ——, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976), has turned upon whether the employee established dissimilar treatment of males and females.[4] This Court has equated the term "sex" in Title VII with the

(Footnote continued from preceding page)

F. Supp. 27 (N.D. Miss. 1973), *aff'd*, 507 F. 2d 611 (5th Cir.), *cert. granted*, 423 U. S. 820, 96 S. Ct. 33, 46 L. Ed. 2d 37 (1975), *petition for cert. dismissed*, 425 U. S. 559, 96 S. Ct. 1752, 48 L. Ed. 2d 169 (1976). Although *Drew* raised questions of public, not private, employment and the Fourteenth Amendment, not Title VII, the District Court below cited the opinion of the district court in *Drew* (App. C, *infra*, p. A22).

[4]When such a showing has been made, as in *Phillips*, this Court has held that a prima facie case of discrimination has been made out and has allowed the employer an opportunity to rebut it by

(Footnote continued on following page)

less emotional term "gender" as used in the *General Electric* opinion and has reiterated that the burden of establishing gender-based discrimination is upon the employee. 429 U. S. at ——, 50 L. Ed. 2d at 355 n. 14.

Both the District Court and the Court of Appeals apparently were blinded by the words "sex" and "pregnancy" for they failed to consider whether Jacobs was an employee who was terminated because she was female *or* simply a female employee who was terminated for a sex-neutral reason.[5] The courts below at most *felt* that it was against the purpose and "policy" of Title VII to terminate Jacobs, but they did not require her to establish a case of gender-based discrimination under Title VII (App. B, *infra*, p. A12).[6]

(Footnote continued from preceding page)

justifying its gender-based discriminatory classification as a bona fide occupational qualification. On the other hand, as in *General Electric*, when the Court has determined that there is no showing of dissimilar treatment of males and females similarily situated, the Court has held that there is no prima facie case of gender-based discrimination and no violation of Title VII. The judicial inquiry ends at that point. The Sixth Circuit simply skipped the prima facie case stage by not requiring Jacobs to show dissimilar treatment of men and women. See *Harper* v. *Trans World Airlines, Inc.*, 525 F. 2d 409, 411 (8th Cir. 1975), cited and applied in *Tuck* v. *McGraw-Hill, Inc.*, 421 F. Supp. 39, 44 & n. 6 and 7 (S.D. N.Y. 1976), which comports with the test as practiced by this Court and conflicts with the analysis of the Sixth Circuit.

[5]The Court of Appeals totally ignored and failed to distinguish the cogent reasoning of the district court in *Wardlaw* v. *Austin Independent School District*, 10 FEP Cases 892 (W.D. Tex. 1975), which held that a school district did not violate Title VII by transferring a pregnant unmarried teacher to a non-teaching position *where there was no evidence that the teacher had been treated any differently than would have been a single male teacher whose status as an expectant parent became known to school officials.* The Sixth Circuit simply said that the facts of that case were different (App. B, *infra*, p. A13).

[6]The error of the Court of Appeals in confusing the analysis of the prima facie case under Title VII with affirmative defenses

(Footnote continued on following page)

Jacobs did not even attempt to show that Sweets discriminated against her as a woman. The record shows that Sweets *did* take action with respect to Jacobs because of her non-marital sexual activities, but there is no evidence, nor was there a finding, that as a male she would have been treated any differently.[7] *Title VII does not limit the freedom of a private employer to terminate an employee who engages in non-marital as opposed to marital sexual activities.* A private employer is free to make employment decisions based upon his beliefs about matters of sexual activity or preference so long as the actions do not have a gender-based discriminatory effect. Thus it has been held that he may take employment actions which differentiate among persons as to parenthood (expectant or actual)

(Footnote continued from preceding page)

which may be raised in *rebuttal* (App. B, *infra*, pp. A13-A14) is exposed in the dissent in *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1202-1206 (7th Cir. 1971) (dissent of Stevens, Circuit Judge), *cert. denied*, 404 U. S. 991, 92 S. Ct. 536, 30 L. Ed. 2d 543 (1971). There it is stated that the *initial* inquiry under §703(a)(1) of the Act, never fairly faced by the Court of Appeals in this case, is simply whether the employment action constitutes ". . . treatment of a person in a manner which but for that person's sex would be different." 444 F. 2d at 1205.

[7]The record shows that other pregnant employees of the company, all of whom were married, were allowed to remain with the company and that there was never any adverse employment action taken because of the pregnancies of these women. One such employee was even hired while pregnant. *Transcript of the Proceedings*, July 17, 1975, pp. 188-89. In light of this and other evidence in the record (see n. 1, *supra*) it is absurd to say, as did the Court of Appeals (App. B, *infra*, p. A13), that the District Court's finding of termination because of unwed pregnancy did not amount to a finding of termination because of non-marital sexual activity. This misconstruction of the case kept the Court of Appeals from perceiving that there had been no showing that men and women had been treated dissimilarly.

versus non-parenthood,[8] marriage versus an unmarried status,[9] and homosexuality versus heterosexuality.[10] Furthermore, the discharge of a transsexual after a sex change operation[11] and the discharge of a male with effeminate traits[12] have been held to be lawful under Title VII.

These characteristics may appear alone or in combination in any individual, i.e., unmarried heterosexual expectant parent (Jacobs), but so long as the employment decision of the private employer is not made on the basis of the employee's sex, the employer may terminate employees on the basis of one or more of the above distinctions. The efforts in Congress in the past as well as in the current session to extend Title VII, or otherwise to provide protection from distinctions with regard to sexual practices, marital status and preg-

[8] *See Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542, 91 S. Ct. 496, 27 L. Ed. 2d 613 (1971), where sex discrimination was found *only* because the differentiation was made between men with children and women with children, *not* because of the distinction between parents and childless persons of both sexes.

[9] *e.g., Stroud* v. *Delta Air Lines, Inc.*, 544 F. 2d 892 (5th Cir. 1977).

[10] EEOC Dec. No. 76-67, 2 CCH Employment Practices Guide ¶6493 (March 2, 1976); EEOC Dec. No. 76-75, 2 CCH Employment Practices Guide ¶6495 (March 2, 1976), wherein it is stated:

> . . . in the instant case Charging Party alleges unlawful employment discrimination based on his homosexuality, a condition which relates to a person's sexual proclivities or practices, not his or her gender; these two concepts are in no way synonymous. There [is] no support in either the language or the legislative history of the statute for the proposition that in enacting Title VII Congress was intended to include a person's sexual *practices* within the meaning of the term "sex" . . . p. 4266 (Emphasis in original).

[11] *Voyles* v. *Ralph K. Davis Medical Center*, 403 F. Supp. 456 (N.D. Cal. 1975).

[12] *Smith* v. *Liberty Mutual Insurance Co.*, 395 F. Supp. 1098 (N.D. Ga. 1975).

nancy itself, are indicative of the limited coverage of the word "sex" in the present statute.[13] It is very clear that the term "sex" (as in gender) when listed with race, religion, color and national origin, does *not* include sexual practices or preferences, marital status, or parental status, expectant or actual.

In refusing to accept Sweets' argument that there was no violation of Title VII because Jacobs failed to show dissimilar treatment of males and females similarly situated, the Court of Appeals (a) paid lip service to but ignored and refused to apply *General Electric* as to the effect of the EEOC pregnancy guideline and the burden and standard of proof in a sex discrimination case under Title VII; (b) cited as authority *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542, 91 S. Ct. 496, 27 L. Ed. 2d 613 (1971), and *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971), but in reality applied the Fourteenth Amendment equal protection rational relationship test to Petitioner's classification of Jacobs as one participating in non-marital sex; (c) misapplied inapposite due process standards and an irrebuttable presumption in determining that pregnancy itself, without more, is a status or characteristic absolutely protected by Title VII; (d) confused the basic right to have children within marriage, *Skinner* v. *Oklahoma*, 316 U. S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942), with a supposed

[13] *Voyles* v. *Ralph K. Davis Medical Center, supra*, 403 F. Supp. at 457; H.R. 451 and H.R. 2998, 95th Cong., 1st Sess. (1977), sexual practices or preferences; H.R. 4294, 95th Cong., 1st Sess. (1977), marital status; S. 955, 95th Cong., 1st Sess. (1977), pregnancy. It is far from clear, however, how these proposals, if enacted, would affect the type of case presented on this petition.

right to procreate outside marriage and misapplied the state action concept of the Fourteenth Amendment to actions by a private employer; (e) failed to apply to the case the appropriate standard, burden and allocation of proof approved by this Court for Title VII cases in which there is an allegation of gender-based discrimination; and (f) fashioned a *per se* test of sex discrimination in all cases involving pregnant females under Title VII based solely upon the EEOC guideline discredited in *General Electric*. 429 U. S. at ——, 50 L. Ed. 2d at 357-360.

As far as counsel for Petitioner can determine, this petition presents to the Court for the first time a Circuit Court's assessment of the applicability of the *General Electric* decision beyond employment benefits cases. This Court should strengthen its holding and repeat its signal to the circuits that the rationale and logic of the *General Electric* opinion as to pregnancy and the standard and burden of proof in Title VII cases must be applied to Title VII sex discrimination actions other than benefits cases. Further the current confusion and conflict among the Courts of Appeals regarding the application of a test for sex discrimination under Title VII, as illustrated by the differences between *General Electric* and *Harper* v. *Trans World Airlines, Inc.*, 525 F. 2d 409, 411 (8th Cir. 1975), on one hand, and this case on the other, is a warning of the need for further action by this Court.

The Sixth Circuit stated that the rule of law advocated by Sweets and previously adopted by this Court in *General Electric* would result in no pregnant

woman ever being protected from sex discrimination under Title VII (App. B, *infra*, p. A12). However, if the test espoused by the Sixth Circuit were to be adopted, there would be an irrebuttable presumption that any employment action taken with respect to a pregnant employee constitutes *per se* sex discrimination under Title VII. If this case is properly viewed as one of sexual *practice* discrimination, then there has been no showing that men and women similarly situated have been treated dissimilarly; the judgment below must be reversed; and Title VII will still protect women and men who are terminated because of their sex or gender.

CONCLUSION

Title VII, while remedial in purpose, is limited in its scope. So far as the Civil Rights Act of 1964 goes, private employers may still discharge or refuse to employ persons for any reason except discrimination made unlawful under Title VII. Jacobs was terminated not because of the fact that she was female but because of her immoral sexual practices which were also unlawful in Kentucky in 1972.[14] Even more importantly, given the allocation of the burden of proof in this case, Jacobs has not *shown* that her "termination and/or constructive termination" constituted unlawful sex discrimination.

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[14]Kentucky Revised Statutes 436.070 in effect in 1972 read as follows:

> Any person who commits fornication or adultery shall be fined not less than twenty dollars nor more than fifty dollars.

Merely because an employee is pregnant at the time of termination does not establish a *per se* or prima facie violation of Title VII. The record conclusively establishes that no other pregnant employee had been transferred, terminated or discriminated against because of pregnancy. Jacobs' marital status coupled with her sexual activities resulted in Sweets' action.

Sweets' aversion to non-marital sexual activity or immoral sexual practices has been translated into an employment action which in no way violates the gender-based discrimination provision of Title VII. This Court should take this opportunity to give further guidance after *General Electric* to the Circuits in general and the Sixth Circuit in particular respecting the parameters of gender-based discrimination under Title VII.

For the reasons stated above, Petitioner submits that this Court should issue a writ of certiorari to review the decision of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 75-2406-07

ROSE M. JACOBS, - - - - *Plaintiff-Appellee, Cross-Appellant.*

v.

THE MARTIN SWEETS COMPANY, INC., - *Defendant-Appellant, Cross-Appellee.*

Before: WEICK and MCCREE, Circuit Judges, and MILLER, Judge, United States Court of Customs and Patent Appeals.

JUDGMENT—Filed Feb. 11, 1977

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed and modified.

It is further ordered that Plaintiff-Appellee-Cross-Appellant recover from Defendant-Appellant-Cross-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT.

(s) John P. Hehman
Clerk

Attest:

_____

Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 75-2406-07

ROSE M. JACOBS, - - - - *Plaintiff-Appellee Cross-Appellant,*

v.

THE MARTIN SWEETS COMPANY, INC., *Defendant-Appellant Cross-Appellee.*

APPEAL from the United States District Court for the Western District of Kentucky.

Decided and Filed February 11, 1977

Before: WEICK and MCCREE, Circuit Judges, and MILLER, Judge, United States Court of Customs and Patent Appeals.*

MILLER, Judge. This action involving alleged sex discrimination in employment because of unwed pregnancy, was brought by Rose M. Jacobs ("Jacobs") against The Martin Sweets Company, Inc., Louisville, Ky. ("Sweets Co." or "Company"), under the provisions of Title VII of the

*The Honorable Jack R. Miller, sitting by designation pursuant to Chapter 13, Title 28, U.S.C.

Civil Rights Act of 1964 ("Act"), Pub. L. No. 88-352, 78 Stat. 253, 42 U.S.C. § 2000e et seq. Sweets Co. appeals from that portion of the district court's amended judgment awarding back wages to Jacobs in the sum of $7,500 pursuant to 42 U.S.C. § 2000e-5(g).[1] Jacobs appeals from that portion of the amended judgment dismissing the class action allegations of her complaint with prejudice. She also asks that the district court's award of attorney's fee be reversed, with certain directions for recomputation. We affirm those portions of the amended judgment pertaining to back wages and the class action issue; the portion pertaining to attorney's fee is modified to the extent that the fee awarded is to be increased by the sum of $1,000 for services rendered on this appeal.

BACKGROUND

Jacobs began her employment with the Sweets Co. on December 9, 1970, as executive secretary to James Hanna, the Senior Vice President. She received an increase in salary to $600 per month on April 1, 1971, an outstanding annual performance evaluation in February of 1972, and a second increase in salary to $633 per month in May of 1972; however, during 1972 she was warned by Hanna on several occasions about her tardiness and absenteeism. During her employment with the Company she was unmarried.

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[1] 42 U.S.C. § 2000e-5(g) provides in pertinent part as follows:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate. . . . Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

Jacobs' testimony was that on September 8, 1972,[2] Hanna called her into his office, shut the doors, and said he had heard from other employees that she was pregnant, which she confirmed; that he declared he could not tolerate it, Martin Sweets, the President, would never approve of it, and he was giving her two weeks' notice, with her last day to be September 22;[3] and that Hanna stated "there would be no probelm whatsoever with getting me a more than good recommendation if I needed it." Following this meeting, Jacobs contacted the District Office of the Equal Employment Opportunity Commission (EEOC), where she spoke with the Department Director, Robert Jeffries, who advised that it would be illegal for the Company to fire her due to her pregnancy and suggested that she get the matter in writing if at all possible. On September 12 she presented two documents to Hanna: (1) a request that he write a letter of recommendation, with the letter indicating it was not due to her work but to her pregnancy that she was being let go; and (2) a notice to her, for Hanna's signature, stating that the Company was required to terminate her employment due to her being pregnant and not married "in order to avoid embarrassment to the company and to your-

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[2] All dates *infra* relate to 1972.

[3] This is corroborated by the testimony of Barend Crawford, who was a payroll clerk for the Company at the time and was employed by the Company from July 1, 1970, until April of 1973. He stated that on September 21 or the morning of September 22 he took the paychecks that were to be distributed on September 22 to Hanna for signature; that these were prepared by a computer service firm; that "when ayone leaves the company you do not make a computer check, you adjust their pay up to the last day that they are there and issue them a typewritten check from the company"; that "[n]o one was ever, to my knowledge, given an adjusted pay unless they were going to be dismissed or had quit the company"; that Hanna told him that Jacobs' computer check would be voided and that he (Crawford) should give her a typewritten paycheck adjusted to what should be paid "through this payday"; that he prepared such a check; and that Hanna told him "This is to protect ourselves in case she doesn't come back."

self," and that the Company intended to issue her a letter of recommendation. She said that Hanna refused to sign and that, while leaving his office, she heard him place a telephone call and ask for the Company's attorney.

Jacobs further testified that on the morning of September 14, S. J. Popson, one of Sweets Co.'s vice presidents, came into her office and told her that Hanna had directed him the night before to supervise her immediate transfer to the Purchasing Department and that she was to clean out her desk, get all her things together, turn in her keys, and not return to the office except under supervision; that this was the first she had heard about a change in her assignment, Hanna having said nothing to her about it. She stated that Popson told her that her pregnancy had been mentioned to him by Hanna; that he did not tell her the transfer was temporary; and that later that day, after her typewriter, office equipment, and other personal things had been moved to the Purchasing Department, she filed a charge against the Company with the EEOC. She also stated that the Purchasing Agent told her that Hanna had called him, also the night before, about the transfer and had said it was to try to get her to quit.[4] Jacobs further stated that her job in the Purchasing Department was "just a clerical position"; that, notwithstanding several attempts on her part, Hanna refused to see her until September 28, when she told him that she had filed suit with the EEOC and would not be returning to the Company; and that she came in on September 25, picked up her paycheck of September 22, and worked in the Purchasing Department.[5] but

[4]John Bowyer, the Purchasing Agent at the time, could not remember such a call from Hanna and denied Hanna had ever told him the reason for the transfer was to force Jacobs to quit.

[5]It does not appear that Jacobs was paid for work on September 25. Referring to September 22, Hanna stated: "She didn't have anything else coming after that date."

that the main reason was to try to see Hanna about staying on with the Company in her former position.

Additional testimony of Jacobs was that she received a notice from Hanna, dated September 18, advising, *inter alia*, that "under current company policy any employee who becomes pregnant shall be allowed to work as her physical condition permits and as long as the work will not jeopardize her health"; that she also received a copy of a notice, dated September 18, to the Purchasing Agent from Hanna, subject: "Temporary Transfer of Rose Jacobs," reciting that due to the senior officer of the Company being on an extended trip and the need for only one executive secretary, it was more feasible to use the senior executive secretary and to transfer Jacobs to the Purchasing Department "to fulfill the overload requirements,"[6] with no change in hours and no reduction in salary.[7]

S. J. Popson testified that Hanna had telephoned him the evening of September 13 and told him that he was to supervise Jacobs' transfer from Hanna's office to the Purchasing Department; that he was not to leave Jacobs alone in the office; that he should get her key to the office after her things were moved out, lock the office, and not allow her to return; that Hanna's instructions were carried out the next morning; and that he did not recollect whether Hanna told him to tell Jacobs that the transfer was temporary.

[6]John Bowyer, the Purchasing Agent, testified that there was an increased work load in his department from July or August until the end of 1972; that there had been an increased work load in previous years; and that he could not remember whether Jacobs had previously done any work for his department. Crawford, *supra* note 3, who had helped Jacobs move from her office to the Purchasing Department, testified that Jacobs had never been temporarily transferred while he was with the Company; also that Jacobs' duties in the Purchasing Department were "clerical."

[7]It appears that Jacobs did little work after the transfer and was on vacation or leave without pay from September 18 to September 22.

The record also shows the following on direct examination of Popson by Jacobs' lawyer:

> Q. Did Mr. Hanna discuss Miss Jacobs' pregnancy with you that evening in that conversation?
> A. In that conversation? All I can say is I can't imagine that it wasn't discussed. I wouldn't take the conversation [sic] and do the job without asking why. And I'm sure that we did go into the ramifications. But as far as the details of what was discussed, I really couldn't remember specifics.

Robert Jeffries, Department Director of the District Office of the EEOC during the period involved, stated that he took a telephone call on or about September 12 from a lawyer for Sweets Co., inquiring about the law pertaining to pregnancy; that the lawyer "asked me to fully explain the laws where the pregnant party was married or unmarried"; and that the conversation pertained to the Company and Jacobs, who had previously talked to him about the Company and her being pregnant and unmarried.

The Company's attorney, Marvin Hirn, testified that his assistant telephoned the District office of the EEOC in September of 1972; that the call was precipitated by Hanna's call to him on September 12, during which "we entered into a discusssion of the company's pregnancy policy"; and that, based on the information his assistant received from the EEOC, he advised Hanna that Jacobs should be permitted to work as long as she was able.

Hanna insisted, *inter alia,* that he did not tell Jacobs that she was fired or would be fired because she was pregnant and unmarried. He stated that Jacobs' "temporary" transfer to the Purchasing Department was to help with the overload and because he did not trust her after she had tendered to him what he labeled a "false statement" for him to sign; that, prior to Martin Sweets' departure for an ex-

tended overseas trip on August 31, Sweets told him to utilize Sweets' secretary during his absence; that highly sensitive negotiations involving the Company had been going on, of which only Sweets, Hanna, and Sweets' secretary were to have knowledge; that he had previously considered using Jacobs for additional help in the Purchasing Department during Sweets' absence; and that, although the Company's Policies and Procedures Manual provided for termination of employment of pregnant employees at the end of six months of pregnancy, this had never been enforced, the Company allowed such employees to work as long as they were able, consistent with their health, and jobs were held open for employees on pregnancy leave.[8] He agreed that it was a common occurrence in the Purchasing Department that the work load increased during the last six months of the year.

OPINION

Discrimination Issue

The district court's determination that, because she was pregnant and unmarried, Jacobs was given two weeks' notice of termination of her employment on September 8, 1972, and was transferred, without consultation and against her wishes, from her job as executive secretary to the Senior Vice President of the Company to a clerical position in the Purchasing Department on September 14, is supported by substantial evidence and is not clearly erroneous. *Smith* v. *South Central Bell Telephone Co.*, 518 F. 2d 68 (CA 6 1975).

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[8]Crawford, *supra* notes 3 and 6, stated that he believed the Company's policy was to allow female employees to work for six months after pregnancy and that to his knowledge the six-month policy was not changed before he left the Company in 1973. The evidence discloses that only two of the Company's employees were pregnant after March 14, 1972; that one took pregnancy leave at the end of her eighth month of pregnancy, while the other, who was hired while she was pregnant, took pregnancy leave five days before her baby was delivered.

The district court's further determination that these actions constituted a termination and/or constructive termination of Jacobs' employment is also supported by substantial evidence, including the reasonable inferences to be drawn therefrom. *See NLRB* v. *Tennessee Packers, Inc., Frosty Morn Division*, 339 F. 2d 203 (CA 6 1964). Although there is conflicting testimony in the record, the district court had the benefit of hearing some of the key witnesses and observing their demeanor.[9]

That Sweets Co. intended the two weeks' notice of termination given Jacobs on September 8 to be carried out is shown by Crawford's testimony that Hanna told him that Jacobs' computer check would be voided and that he should give her a typewritten check adjusted to what should be paid through September 22, in accordance with the practice when employees left the Company. The naked fact that Jacobs came in and worked on September 25 for the purpose of trying to see Hanna does not overcome the fact that her employment had been earlier terminated and/or constructively terminated. Sweets Co. contends that Jacobs' transfer to the Purchasing Department was "temporary." However, Hanna himself testified that he didn't think he orally told Jacobs it was temporary, so it was not until she received a copy of the notice of September 18 to the Purchasing Agent (a document that could be considered self-serving) that the transfer was labeled "temporary." It is further contended that Jacobs voluntarily quit, but there are two answers to this: (1) "It cannot be said that a man voluntarily quits the employment of the master after he has been notified that his services are no longer desired."

[9]We note the finding of the district court that Jacobs had conceded "[w]ith commendable candor" that she had not at all times been diligent and punctual in attendance; also, while Hanna claimed that her transfer was to help with the increased work load and because of matters arising from Martin Sweets' leaving the country, the increased work load was a common occurrence, Jacobs had never been transferred before, and her transfer occurred *over two weeks after Sweets departed.*

Stark Distillery Co. v. *Friedman*, 150 Ky. 820, 823, 150 S. W. 981, 983 (1912); and (2) Although Jacobs received a copy of the notice from Hanna to the Purchasing Agent that there would be no change in her hours and salary, the fact remains that the transfer from her position as executive secretary to clerical duties in the Purchasing Department was a demotion which, at the time of the transfer on September 14, had the appearance of being permanent. Taking into account the reason for such a demotion—that she was pregnant and unmarried, the conditions involving the transfer could properly be considered intolerable and her "quitting" involuntary. *See NLRB* v. *Tennessee Packers, Inc., Frosty Morn Division, supra.*[10]

The dispositive question is whether the district court erred in concluding, as a matter of law, that the termination and/or constructive termination of Jacobs' employment constituted a violation of section 703 of the Act, 42 U.S.C. § 2000e-2(a), which provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive

[10]Sweets Co. cites *Muller* v. *United States Steel Corp.*, 509 F. 2d 923 (CA 10), *cert. denied*, 423 U. S. 825 (1975), for the proposition that its conduct did not achieve the level of a constructive discharge. However, the factual situation in *Muller* was entirely different. As pointed out in *Steel Indus., Inc.* v. *NLRB*, 325 F. 2d 173 (CA 7 1963), also cited by Sweets Co., the factual situation varies from case to case, and the employer's "complete freedom" exists only when discrimination is absent.

> any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Sweets Co. argues that "Jacobs has never shown that had she been a male expectant parent, she would have been treated any differently by the Sweets Company." The sophistry of this argument is that it equates pregnancy with the condition of "expectant parent" in a male. Pregnancy is a condition unique to women, so that termination of employment because of pregnancy has a disparate and invidious impact upon the female gender. The point of the argument is that there must be men and women similarly situated who are treated in a disparate manner. The point is not well taken, for it would effectively exclude pregnancy from protection in *all* Title VII cases. The Supreme Court has stated that maternity leave rules directly affect "one of the basic civil rights of man." *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 640 (1974).[11] To exclude such a basic civil right from protection against invidious employment termination would be contrary to the policy to which Title VII is directed, namely: that race, religion, nationality, and sex are irrelevant factors in employment opportunity.[12] *Griggs* v. *Duke Power Co.*, 401 U. S. 424,

[11] Although the *Cleveland Board of Education* case was decided under the due process clause of the Fourteenth Amendment, the language quoted from the Court's opinion came from *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942), which involved the equal protection clause of the Fourteenth Amendment. Title VII extends beyond the reach of the equal protection clause. *Satty* v. *Nashville Gas Co.*, 522 F. 2d 850, 855 (CA 6 1975), *cert. granted* (No. 75-536, January 25, 1977).

[12] The recent holding of the Supreme Court in *General Electric Co.* v. *Gilbert*, —— U. S. ——, 13 F.E.P. Cases 1 (1976), that exclusion of pregnancy from the risks covered by an employer's disability *benefits* plan does not violate Title VII, can hardly be regarded as precedent for excluding pregnancy from protection against *invidious* employment termination. *See Armour & Co.* v. *Wantock*, 323 U. S. 126, 133 (1944).

436 (1971); *Holthaus* v. *Compton & Sons, Inc.*, 514 F. 2d 651 (CA 8 1975).

Sweets Co. next argues that Jacobs has not shown that she would have received different treatment had her premarital sexual activity not resulted in pregnancy and that the EEOC's guideline applicable to pregnancy[13] is unconstitutional because it is "an attempt to control the moral policies of a private company with respect to the premarital sexual behavior of individuals of both sexes." However, the district court found that Jacobs' employment was terminated because she was pregnant and unmarried—not because of her premarital sexual activity. Apart from the EEOC's guideline, which, in the absence of a showing that it conflicts with the letter or spirit of the Act (not shown here), is entitled at least to some weight, the district court's finding establishes a prima facie case of discrimination. *See McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973).[14] Sweets Co.'s argument that the "unmarried" portion of the finding renders Jacobs' pregnancy different for purposes of Title VII is supported only by its citation to *Wardlaw* v. *Austin School District* (not officially reported), the facts of which are substantially different. 10 F.E.P. Cases 892 (W.D. Tex. 1975). The argument impliedly suggests that this court permit "artificial, arbitrary, and unnecessary barriers to employment" (condemned in *Griggs* v. *Duke Power Co.*, *supra* at 431) in the case of unwed pregnancy, while declaring such barriers unlawful in the case of wed pregnancy. However, there is no evidence that such a classification has any rational relationship to the

[13] 29 C.F.R. § 1604.10(a) provides as follows:

> A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Title VII.

[14] The order and nature of proof prescribed by the Supreme Court in *McDonnell Douglas*, a racial discrimination case under Title VII, is applicable in sex discrimination cases. *Edwin L. Wiegand Co.* v. *Jurinko*, 414 U. S. 970 (1973).

normal operation of Sweets Co.'s business. *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542, 544 (1971). *See Griggs* v. *Duke Power Co., supra* at 431.

In view of the foregoing, we hold that the district court committed no error in concluding, as a matter of law, that the termination and/or constructive termination of Jacobs' employment constituted a violation of section 703 of the Act, 42 U.S.C. § 2000e-2(a).[15]

Class Action Issue

The district court found that Jacobs' employment discrimination claim was entirely separate from her attack on Sweets Co.'s policy with respect to medical payments expense and sick pay during pregnancy; that there was no evidence that Jacobs suffered any actual or threatened loss or was likely to suffer any loss as a result of that policy; that Jacobs was not employed by Sweets Co. at any time during which it would have been appropriate and timely for her to demand payment under or challenge the validity of that policy; and that Jacobs did not make any actual claims for pregnancy-related expenses that were denied by the Company. These findings are supported by substantial evidence and are not clearly erroneous. *Smith* v. *South Bell Telephone Co., supra.*

The decisive issue is whether the district court erred in determining that Jacobs lacked both the requisite standing under Article III of the Constitution and class action status under Fed. R. Civ. P. 23(a),[16] so that she was not a proper

[15]The parties do not contest the district court's computation of the $7,500 in back wages.

[16]The rule states:

(a) Prerequisites to a class action.

One or more members of a class may sue or be used as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2)

(Footnote continued on following page)

party to maintain a class action attacking the Company's pregnancy/sick pay/medical expense policy.[17]

Jacobs argues that her claim of unlawful termination of employment because of pregnancy involves all present or future employees adversely affected by all the Company's pregnancy policies. However, we agree with the district court that she has not satisfied "the threshold requirement imposed by Art. III of the Constitution that those who seek in invoke the power of federal courts must allege an actual case or controversy." *O'Shea* v. *Littleton,* 414 U. S. 488, 493 (1974). We note that Jacobs' complaint alleges that her employment was unlawfully terminated because of her sex (when she would have been approximately six-weeks pregnant). However, she has not alleged, much less shown, "specific, concrete facts" demonstrating that the Company's policy regarding medical payments expense and sick pay during pregnancy was applied to her. *Warth* v. *Seldin,* 422 U. S. 490, 508 (1975). As found by the district court, she did not make any actual claims for pregnancy-related expenses that were denied by the Company.[18]

With respect to Jacobs' status under Fed. R. Civ. P. 23(a), she cites *Tipler* v. *E. I. duPont deNemours & Co.,* 443 F. 2d 125, 130 (CA 6 1971), and *Wetzel* v. *Liberty Mu-*

(Footnote continued from preceding page)

there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

[17]This policy appears to be the sole basis set forth in the complaint for Jacobs' class action.

[18]Jacobs' allegation in her complaint that the Company unlawfully maintained a policy requiring female employees to terminate their employment at the end of the sixth month of pregnancy would also propose a class to which she does not belong. Moreover, Jacobs produced no evidence that the employment of any of the Company's employees was terminated in accordance with such a policy.

tual Insurance Co., 508 F. 2d 239, 247 (CA 3), *cert. denied*, 421 U. S. 1011 (1975), both of which held that a complainant who is no longer employed may still be an adequate representative of a class of employees. However, unlike the complainants in those cases, Jacobs has not shown that she belongs to the class she seeks to represent. *See Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 n.4 (1973). Jacobs says it is "difficult to understand how the interests of the class are protected by allowing the unlawful practices to continue until some other employee has the termerity [sic] to challenge the Sweets Company policies," but this ignores the requirement of Fed. R. Civ. P. 23(a)(3) that Jacobs' claim be "typical" of the claims of the class.[19] The district court correctly determined that Jacobs lacked class action status under Fed. R. Civ. P. 23(a).[20]

Attorney's Fee

Jacobs contends that the district court abused its discretion in making an award of $3,500 for attorney's fee and asks that this portion of the court's amended judgment be reversed with directions that a fee be awarded for services in the district court and on appeal based on hours times hourly rate times other relevant factors, principally the contingent nature of the representation. She points out that the affidavit accompanying her motion for award of fee shows that her counsel had devoted 129.3 hours on the case; that an award of $3,500 would amount to only $27 per hour.

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[19]There is no evidence showing any other Sweets Co. employee similarly situated to her. *Jurinko* v. *Edwin L. Wiegand Co.*, 477 F. 2d 1038, 1041 n.7 (CA 3), *cert. granted, judgment vacated, and case remanded for other reasons*, 414 U.S. 970 (1973).

[20]The district court said: "Class action status in this case appears vulnerable to attack under the provisions of 23(a)(1), 23(a)(2), and, most significantly, under 23(a)(3). We regard this as a "determination" that Jacobs lacked class action status under Fed. R. Civ. P. 23(a).

Section 706(k) of the Act, 42 U.S.C. § 2000e-5(k), provides that: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ." Although this court has interpreted the statute to require the award of a fee that would approximate the customary fee in the community for similar work, it is clear that more than a simple division of an award by the number of hours devoted to the case is needed to support a conclusion that the district court abused its discretion. *Singer* v. *Mahoning County Board of Mental Retardation*, 519 F. 2d 748 (CA 6 1975). On the record before us, we are not persuaded that the district court abused its discretion. However, it is evident that Jacobs' counsel has expended considerable professional time and effort on this appeal, so that the fee allowed below should be increased to reflect such services.

Those portions of the amended judgment pertaining to back wages and the class action issue are affirmed. That portion pertaining to attorney's fee is modified to the extent that the fee awarded below is increased by $1,000 for services rendered on this appeal.

Affirmed and modified.

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C-74-348-L(B)

ROSE M. JACOBS - - - - - - - - - *Plaintiff*

v.

THE MARTIN SWEETS COMPANY, INC. - - *Defendant*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action was filed on September 11, 1974, and is brought under the provisions of Title VII of the 1964 Federal Civil Rights Act, 42 U.S.C. §§1331(a) and 1343(3). It arises out of a charge filed with the United States Equal Employment Opportunity Commission on September 14, 1972, by the plaintiff, Rose M. Jacobs, alleging discrimination in employment on account of sex by the defendant, the Martin Sweets Company, Inc.

A court trial was conducted on July 17, 1975, following which the respective parties filed their separate proposed findings of fact and conclusions of law. The matter is now submitted for judgment.

Plaintiff, Rose M. Jacobs, a female, was employed by the defendant, The Martin Sweets Company, Inc., on December 9, 1970, as Executive Secretary to the Secretary and Treasurer of the company.

FINDINGS OF FACT

1. On September 8, 1972, plaintiff, Rose M. Jacobs, was told by her immediate supervisor at The Martin Sweets Company, Inc., James Hanna, the Senior Vice President, that she would be terminated in two weeks, i.e., on September 22, 1972, because she was pregnant and unmarried.

2. Shortly thereafter, plaintiff contacted the E.E.O.C. and was advised that it was unlawful under Title VII of the 1964 Federal Civil Act to terminate a female employee because of pregnancy. She was advised to seek a written statement of the reason for her termination from her employer.

3. On September 12, 1972, plaintiff requested Mr. Hanna to give her a written statement that termination was because of pregnancy. He refused and promptly contacted the company's attorney, Marvin Hirn, for advice.

4. On September 13, 1972, Jack Reisz, an attorney for defendant company, talked via the phone to an E.E.O.C. employee concerning the specific problem of Rose Jacobs' termination.

5. On September 13, 1972, Mr. Hanna telephoned another employee of The Martin Sweets Company, Stephen J. Popson, and told him to transfer Rose Jacobs to the Purchasing Department the following morning, September 14, 1972. Mr. Hanna mentioned the fact that she was pregnant and unmarried and asked Mr. Popson to not leave Rose Jacobs unattended and to take her keys to the office.

6. On the morning of September 14, 1972, at approximately 8:30 A.M., plaintiff was transferred to the Purchasing Department as a clerical employee.

7. During the time Rose Jacobs was with the defendant, she received two raises in salary, a $75.00 per month raise on April 1, 1971, and a $33.00 per month raise on May 8, 1972. Her performance evaluations during her employment indicate that she was an excellent employee and

had been doing a superior job for The Martin Sweets Company.

8. Although Rose Jacobs had had some problem with tardiness and absenteeism, these problems had not been considered serious in her Annual Performance Evaluation on February 18, 1972, and had not prevented her from receiving a raise in salary on May 8, 1972.

9. Rose M. Jacobs was given two weeks notice of termination on September 8, 1972, because she was pregnant and unmarried, and was transferred to a clerical position in the Purchasing Department on September 14, 1972.

10. At the time she left the employ of The Martin Sweets Company, Rose Jacobs was earning $7,596.00 per annum. Her replacement, Dolores Eisenbeis, hired on November 8, 1972, has received three increases in salary since her employment, totaling $1806.40 per annum. It is reasonable to assume that Rose Jacobs would be earning a higher salary had she remained in the employ of The Martin Sweets Company.

11. Since her termination by The Martin Sweets Company, Rose Jacobs has earned $696.00 in 1972, $3457.43 in 1973, and $6522.52 in 1974. The wages earned in 1975 were not known at the time of trial.

12. With commendable candor, the plaintiff has conceded that she has not at all times been diligent and punctual in attendance. She has had a problem with tardiness and absenteeism and, undoubtedly, this has had and will have an adverse impact to some degree on her wages. In addition, she has constantly been on the lookout for other employment, all of which render it highly unlikely that she would have received periodic increases either with the regularity or in the amounts her replacement has enjoyed for the period of time involved in this case. All considered, it is reasonable to assume that Rose Jacobs has lost the sum of $7500.00 in wages to date of trial.

13. The acts complained of herein are predominantly individual in nature and give rise to a monetary claim for damages and the facts and circumstances presented here obviate the necessity for injunctive relief.

CONCLUSIONS OF LAW

1. This action arises under Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq., and 28 U.S.C. §§1331(a) and 1343(3), and the Court has jurisdiction of the subject matter and of the parties.

2. Rose M. Jacobs filed a charge alleging unlawful discrimination because of sex at defendant's plant with the United States Equal Employment Opportunity Commission on or about September 14, 1972. 29 C.F.R. §1601.11 (b).

3. Rose M. Jacobs was given two weeks notice of termination by her employer on September 8, 1972, and was subsequently transferred without consultation and against her wishes on September 14, 1972, from her job as Executive Secretary to the Senior Vice-President of the company to a clerical position in the Purchasing Department. The reason for these actions was that she was pregnant and unmarried. The termination and/or constructive termination violates Section 703(a) of the Act, 42 U.S.C. §2000e-2(a), which is as follows:

> "It shall be an unlawful employment practice for an employer
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any

individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

Doe v. *Osteopathic Hospital of Wichita,* 333 F. Supp. 1357, 3 F.E.P. Cases 1128 (D. Kans., 1971); and *Andrews* v. *Drew School District,* 371 F. Supp. 27, 6 F.E.P. Cases 872 (N.D., Miss., 1973).

4. Her termination and/or constructive termination also violates the E.E.O.C. Guidelines on Discrimination Because of Sex found in 29 C.F.R. §1604.10. These Guidelines are as follows:

Section 1604.10 Employment Policies Relating to Pregnancy and Childbirth

(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in *prima facie* violation of Title VII

The Guidelines have been upheld in this Circuit in *Farkas* v. *School District,* 8 F.E.P. Cases 288, aff'd mem. 506 F. 2d 1400 (CA 6, 1974) and in *Wetzel* v. *Liberty Mutual Insurance,* 9 F.E.P. Cases 227, 511 F. 2d 199 (CA 3, 1975).

5. The finding of unlawful discrimination and the clear intent of Congress that the grant of authority under Title VII should be broadly read and applied mandates an award of back pay. *Meadows* v. *Ford Motor Co.,* 510 F. 2d 939 (CA 6, 1975); and *Head* v. *Timken Roller Bearing Co.,* 486 F. 2d 870, 876 (CA 6, 1973).

6. Pursuant to the provisions of Section 706(g), 42 U.S.C. §2000e-5(g), Rose Jacobs is entitled to the amount of wages she reasonably would have earned at the defendant from September 14, 1972, to the present, less those

amounts she actually earned in the interim. Of course, unrealistic exactitude in the amount is not required. *Pettway* v. *American Cast Iron Pipe,* 494 F. 2d 211 (CA 5, 1974).

7. The plaintiff is entitled to recover from the defendant her costs, including a reasonable attorney's fee.

Judgment shall be entered consistent with these Findings.

This 18th day of August, 1975.

/s/ Rhodes Bratcher
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action File No. C-74-348-L(B)

ROSE M. JACOBS

v.

THE MARTIN SWEETS COMPANY, INC.

JUDGMENT

This action came on for trial before the Court, Honorable Rhodes Bratcher, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff, Rose M. Jacobs, recover of the defendant, The Martin Sweets Company, Inc., the amount of wages she reasonably would have earned at the defendant company from September 14, 1972, to the present, less those amounts she actually earned in the interim. Of course, unrealistic exactitude in the amount is not required.

It is Further Ordered and Adjudged that the plaintiff recover her costs, including a reasonable attorney's fee.

Dated at Louisville, Kentucky, this 18th day of August, 1975.

August Winkenhofer, Jr.
Clerk of Court

By: /s/ Barbara DeSpain
Deputy Clerk

APPENDIX E

IN THE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Civil Action No. C-74-348-L(B)

ROSE M. JACOBS, - - - - - - - *Plaintiff*

v.

THE MARTIN SWEETS COMPANY, INC., - - *Defendant*

AMENDED JUDGMENT

This action came on for trial before the court, Honorable Rhodes Bratcher, United States District Judge, presiding, on July 17, 1975, and the issues having been duly tried, and the court having made its decision by an order entered August 15, 1975 and by Findings of Fact and Conclusions of Law entered August 18, 1975.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The Findings of Fact and Conclusions of Law entered by the court in this action on August 18, 1975, are hereby incorporated by reference as if fully copied herein.

2. The plaintiff, Rose M. Jacobs, shall recover of the defendant, The Martin Sweets Company, Inc., back pay in the sum of $7,500.00, pursuant to the provisions of 42 U.S.C. §2000e-5(g).

3. The plaintiff, Rose M. Jacobs, shall recover her costs herein expended, including a reasonable attorney's fee in the sum of $3,500.00, pursuant to the provisions of 42 U.S.C. §2000e-5(k).

4. For the reasons stated in the court's order of August 15, 1975, the plaintiff, Rose M. Jacobs, lacks standing to maintain a class action, and the class allegations of plaintiff's complaint are hereby dismissed with prejudice.

5. This Amended Judgment shall serve in place and in stead of the judgment entered herein on the 18th day of August, 1975.

/s/ Rhodes Bratcher
U. S. District Judge

Entered: September 10, 1975

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 75-2406
75-2407

ROSE M. JACOBS - - - - *Plaintiff-Appellee Cross-Appellant*

v.

THE MARTIN SWEETS COMPANY, INC. *Defendant-Appellant Cross-Appellee*

ORDER STAYING MANDATE PENDING APPLICATION FOR WRIT OF CERTIORARI—Filed March 9, 1977

On Motion of Defendant-Appellant/Cross-Appellee The Martin Sweets Company, Inc., by counsel,

IT IS HEREBY ORDERED AND ADJUDGED that the issuance of the mandate in this action shall be stayed to and including Friday, April 1, 1977, pending application by The Martin Sweets Company, Inc., for a writ of certiorari to the United States Supreme Court.

Entered this 8th day of March, 1977.

/s/ Paul C. Weick
Judge, United States Court of Appeals for the Sixth Circuit

Tendered By:
/s/ Ronald D. Ray
/s/ John S. Reed
Greenebaum Doll Matthews & Boone
3300 First National Tower
Louisville, Kentucky 40202
Counsel for The Martin Sweets Company, Inc.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1347

THE MARTIN SWEETS COMPANY, INC. - Petitioner

versus

ROSE M. JACOBS - - - - - Respondent

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1347

THE MARTIN SWEETS COMPANY, INC. - *Petitioner*

v.

ROSE M. JACOBS - - - - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT ROSE M. JACOBS IN OPPOSITION

The Respondent, Rose M. Jacobs (hereinafter referred to as "Jacobs"), opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

COUNTERSTATEMENT

This case concerns the termination of one employee of a small corporation in Louisville, Kentucky, *because* she was pregnant and unmarried. The District Court concluded that Jacobs termination was a violation of

Section 703(a) of the 1964 Civil Rights Act, 42 U.S.C. 2000e-2(a), and she was awarded $7,500.00 in back pay (App. A of Petition, p. 21; App. E of Petition, p. 25).

The United States Court of Appeals for the Sixth Circuit affirmed and held that termination *because of* pregnancy has a disparate and invidious impact upon the female gender (App. B of Petition, p. 12). The opinion of the Sixth Circuit carefully sets forth the facts (App. A of Petition, pp. 4-9) and reaffirms the District Court's determination that the termination was because of pregnancy and not because of any premarital sexual activity (App. A of Petition, p. 13).

Contrary to the statement of the case presented by the Petitioner, the employer did not learn of any non-marital sexual activity by Jacobs, but learned of her pregnant condition only and terminated her for that reason. The record of the case is totally devoid of any evidence of how Jacobs became pregnant or of her non-marital activities, conduct, practices, or preferences, and certainly there is nothing in the record by which anyone could judge (rightly or wrongly) whether her conduct was ever improper or immoral.

REASONS FOR DENYING THE WRIT

I.

There Is No Factual Support In the Record For the Question Presented

The issue tried before the District Court on July 17, 1975, was whether Jacobs was terminated or constructively terminated from her position as Executive Secretary to the Vice-President of the corporation

because she was pregnant and unmarried. The Sweets Company denied that she was terminated for that reason, but both the District Court and the Court of Appeals have determined that her pregnancy was the basis for the termination.

The Sweets Company now attempts to change the issue. It says the question it wants the Supreme Court to decide is:

> Does a private employer violate Title VII of the Civil Rights Act of 1964 by terminating an unwed pregnant employee for *engaging in non-marital sexual activity of which the employer disapproves?* (Our emphasis.)

The factual record in this case does not present that issue. This was not and is not a sexual practice case at all. There is no evidence in the record of any sexual activity, not even one incident, by anyone associated with the case.

The question of whether a private employer can terminate employees for normal or exotic sexual activities of which he disapproves may be a question of some interest to some people, but it is not presented by this case.

Counsel for Jacobs has neither a desire nor an intention to be frivolous, but for all the record in this case discloses, Jacobs could have become pregnant as a result of artificial insemination. Other possible obviously moral methods by which an unmarried female can become pregnant are set forth in *Andrews* v. *Drew Municipal Separate School District,* 507 F. 2d 611, 615 (5th Cir., 1975). The alleged morality of a policy of

terminating unmarried pregnant female employees is also rationally and reasonably questioned in that opinion.

This Court is a court of law and decides legal issues of great national importance presented to it by an adequate factual record to sharpen and illuminate the issues. The issue which Sweets Company asks this Court to decide is simply not factually before the Court.

II.

The Decisions Below Are Clearly Correct; There Is No Conflict Of Decisions

There are few reported cases which have considered the exact question which was presented to the District Court and the Court of Appeals, but those where the issue has been squarely presented are in accord with the decision in this case and were relied upon by the District Court. *Doe* v. *Osteopathic Hospital of Wichita,* 333 F. Supp. 1357 (D. Kans., 1971) and *Andrews* v. *Drew School District,* 371 F. Supp. 27 (N.D., Miss., 1973). As the Sixth Circuit concluded, the facts of the only case which appears to be *contra* are substantially different. *Wardlaw* v. *Austin School District,* 10 FEP Cases 892 (W.D., Tex., 1975).

The only two Circuits which have considered the legality of the termination or the refusal to hire unmarried pregnant employees have agreed that such a policy and practice is unlawful under both Title VII and the Fourteenth Amendment.

Further, this Court has recognized that maternity policies directly affect "one of the basic civil rights of

man." *Cleveland Board of Education* v. *La Fleur,* 414 U. S. 632, 640 (1974). Employees should not be required to choose between such basic rights as employment and maternity. *Truax* v. *Raich,* 239 U. S. 33, 34 (1915).

Those pregnancy issues which were not resolved by this Court in *General Electric Company* v. *Gilbert,* 429 U. S. ——, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976), should be resolved by this Court in *Nashville Gas Co.* v. *Satty,* No. 75-536, *certiorari granted,* January 25, 1977; and *Richmond Unified School District* v. *Berg,* No. 75-1069, *certiorari granted,* January 25, 1977, and nothing would be added to those decisions by a grant of *certiorari* in this small case and consideration of this case would be a waste of the Court's valuable time and resources.

CONCLUSION

For the foregoing reasons, respondent, Rose M. Jacobs, submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Rose M. Jacobs

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1347

THE MARTIN SWEETS COMPANY, INC. - Petitioner

versus

ROSE M. JACOBS - - - - - - Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1347

THE MARTIN SWEETS COMPANY, INC. - *Petitioner*

v.

ROSE M. JACOBS - - - - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Petitioner The Martin Sweets Company, Inc. ("Sweets" or "Petitioner"), by counsel, respectfully submits this brief in reply to the brief in opposition filed by Respondent Rose M. Jacobs ("Jacobs" or "Respondent").

OPINION BELOW

Since the filing of the petition for writ of certiorari, the opinion of the Court of Appeals for the Sixth Circuit has been reported at 13 E.P.D. ¶11,537.

REASONS FOR GRANTING THE WRIT

The following is a reply to the two points raised by Respondent.

I.

The Question Presented Fairly Includes Important Questions Set in the Terms and Circumstances of the Case.

Whether or not this case is characterized as a "sexual practices" case is not critical. The critical question is whether or not the record facts, including those found by the District Court, show sex discrimination which is unlawful under Title VII of the Civil Rights Act of 1964.

Respondent's position is that the question presented by Petitioner on page 2 of the petition in this case is not presented by the record below. The question presented in the petition was framed in the terms and circumstances of the case in such a way as to avoid a series of unnecessarily repetitious and overlapping questions to this Court. Rule 23(1)(c) of the Rules of the Supreme Court makes it clear that the question presented will be read to include all questions fairly comprised therein. The question presented in the petition plainly asks the Court to establish in the context of a termination case, the burden and standards of proof required of an unwed pregnant plaintiff alleging a violation of the sex discrimination provisions of Title VII.

What the District Court and the Court of Appeals for the Sixth Circuit failed to comprehend throughout their consideration of this case is that termination of Respondent Jacobs because of unwed pregnancy did not violate the sex discrimination provisions of Title VII. The reason for the erroneous decisions and misleading characterization of this case as a sex discrimination matter is that the District Court and the Sixth Circuit failed to apply the burden of proof standards of *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792, 39 S. Ct. 1817, 36 L. Ed. 2d 668 (1972). The District Court found and the Sixth Circuit agreed that Jacobs was terminated and/or constructively terminated by Sweets because of unwed pregnancy, but neither Court analyzed or explained why that action constitutes prohibited gender-based discrimination.

The record shows that Jacobs was replaced by another woman (Transcript of the Proceedings, July 17, 1975, pp. 195, 227). This clearly negatives the essential element of Jacobs' prima facie case concerning which Jacobs introduced no evidence at all. *McDonnell Douglas Corp.* v. *Green, supra,* 411 U. S. at 801-802. Further, the other pregnant employees of Sweets, all of whom were married, had never been subjected to any adverse employment action as a result of pregnancy (Petition, p. 3, n. 7, and cites to the record therein).

While reasonable persons might differ over attitudes regarding unwed pregnancy, the principle of *General Electric Co.* v. *Gilbert,* 429 U. S. ——, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976), makes it abundantly clear

that employment actions taken with respect to pregnant employees do not *per se* amount to gender-based discrimination prohibited by Title VII. The Sixth Circuit and other Courts of Appeals have apparently been blinded by the single fact that only women can become pregnant. Those courts held, prior to *General Electric,* that any classification involving pregnancy was some sort of *per se* violation of the sex discrimination provisions of Title VII. Now, even after *General Electric,* and despite the compelling fact that Jacobs was replaced by another woman, the Sixth Circuit cannot see beyond the fact that she was pregnant.

An employment action taken because of unwed pregnancy does not amount to an employment action taken because of gender. Sweets has neither (1) taken any employment action with regard to Jacobs because of her gender nor (2) foreclosed even one position in the job market to women. Unless Sweets' action resulted in one of these two things, there has been no violation of the letter or the spirit of Title VII of the Civil Rights Act of 1964. *General Electric Co.* v. *Gilbert, supra.*

II.

The Sixth Circuit's Decision Is in Conflict With *General Electric Co.* v. *Gilbert* and This Case Presents Issues Not Raised in *Satty* and *Berg.*

The second point which Respondent raises in her brief is equally inappropriate and without merit. The decision of the Sixth Circuit is in conflict with the heart of this Court's holding in *General Electric Co.* v. *Gilbert, supra.* Equally serious, it is misleading and incorrect to state, as Respondent did on page 5 of her brief, that the case at bar can add nothing to the issues to be presented to the Court in *Nashville Gas Co.* v. *Satty,* No. 75-536, cert. granted, January 25, 1975; and *Richmond Unified School District* v. *Berg,* No. 75-1069, cert. granted January 25, 1977. First, counsel for Respondent presumes to tell the Court what issues it will decide in those two cases. Secondly, it must be noted that *Satty* and *Berg* deal with a pregnancy issue in the context of benefits or employment conditions, as did the *General Electric* case.

In contrast, the case at bar presents pregnancy issues in the context of a termination case and, in that sense, gives the Court the opportunity, not present in any of the benefits or conditions cases because of the factual context, to define, for the first time, sex discrimination in a termination case. The Court could also draw as sharp a distinction as possible between *sex discrimination* cases and *sexual practice* cases which are outside Title VII. These questions certainly were not raised or considered in *General Electric,* nor are

they presented for consideration in *Satty* or *Berg* or in other benefits and conditions of employment cases. This final point again illustrates the great need on the part of the courts and the bar for guidance as to the parameters of unlawful sex discrimination.

CONCLUSION

For the reasons stated above and in the petition, Petitioner requests that this Court issue a writ of certiorari to review the decision of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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